

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

KENNETH F. PHILLIPS, derivatively on behalf of  
VBENX CORPORATION and derivatively on behalf of  
CFN AGENCY, INC., a wholly owned subsidiary of  
YouDecide.com, Inc.,

Plaintiff,

v.

Civil Action No. 17-cv-11697-MGM

WALTER SMITH, PETER MARCIA,

Individual Defendants,

VBENX CORPORATION, YOUDECIDE.COM, INC.,  
CFN AGENCY, INC.,

Nominal Defendants.

**DEFENDANTS' FRCP 12(b)(6) MOTION TO DISMISS  
SHAREHOLDER DERIVATIVE COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants, Walter Smith (“Smith”) and Peter Marcia (“Marcia”) (together “Defendants”), seek dismissal of the Complaint as time barred and for failure to state a claim upon which relief can be granted.

Plaintiff knew or should have known about each tort claim asserted in this matter by May 29, 2014 – more than three years before filing the Complaint. It is plain from the face of the Complaint and other public documents that Claims I (breach of fiduciary duty), Claim III (unjust enrichment) and Claims IV and V (aiding and abetting) are time barred and should be dismissed.

Additionally, each claim is legally flawed, failing to state a claim upon which relief can be granted. Defendants’ actions are protected by the business judgment rule and accordingly there can be no breach of fiduciary duty. Claim I must be dismissed. Additionally, there is no

contract governing the relationship between Plaintiff and Defendants or the Company, and Defendants; accordingly, there can be no implied covenant of good faith and fair dealing. Count II must be dismissed. There are no allegations of a benefit conferred to Defendants resulting in an impoverishment of the Company. Count III for unjust enrichment must be dismissed. Finally, where a defendant is liable as a fiduciary he cannot also be secondarily liable for aiding and abetting. Counts IV and V must be dismissed.

Defendants respectfully request dismissal of the Complaint.

Dated: October 5, 2017

WALTER SMITH and PETER MARCIA,

By their attorneys,

/s/ Melissa Nott Davis

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**REQUEST FOR ORAL ARGUMENT PURSUANT TO LOCAL RULE 7.1(d)**

Defense Counsel believes that given the complicated history underlying this litigation and claims set out in the Complaint oral argument would assist the Court in rendering a decision on this Motion. Defendants wish to be heard in oral argument and make this request pursuant to Local Rule 7.1(d).

/s/ Melissa Nott Davis

Melissa Nott Davis

**CERTIFICATION PURSUANT TO LOCAL RULE 7.1(a)(2)**

Pursuant to Local Rule 7.1(a)(2), the undersigned counsel for Defendants hereby certifies that Defense Counsel have conferred with Counsel for the Plaintiff and have attempted in good faith to resolve or narrow the issues presented in this Motion. The Plaintiff opposes this Motion.

/s/ Melissa Nott Davis  
Melissa Nott Davis

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those non-registered participants (if any) on October 5, 2017.

/s/ Melissa Nott Davis  
Melissa Nott Davis